STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of A. LESLIE, Minor.

UNPUBLISHED
December 17, 2013

No. 316306
Shiawassee Circuit Court
Family Division
LC No. 10-012863-NA

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). For the reasons stated in this opinion, we affirm.

I. BACKGROUND

In November 2010, the Department of Human Services (DHS) filed a petition for temporary jurisdiction over the minor child based on allegations that she was emotionally and physically abused by respondent. Following a jury trial in July 2011, the trial court exercised jurisdiction over the child based on a substantial risk of harm to the child's mental well-being and an unfit home environment. The child was placed with her father in Virginia and respondent was ordered to participate in reunification services and comply with the requirements of a parent-agency treatment plan. The trial court also ordered respondent to sign releases to enable DHS to obtain information about respondent's progress with services.

In August 2012, DHS filed a supplemental petition to terminate respondent's parental rights. During the course of the termination hearing, the trial court precluded respondent from calling as witnesses employees with the federal Veteran's Affairs (VA) Hospital unless she signed releases allowing opposing counsel access to the witnesses' files for purposes of cross-examination.[1] Respondent was also ordered to provide the file of Maxwell Taylor, who conducted a psychological evaluation of respondent, if respondent intended to present Taylor's testimony at the termination hearing. The trial court found that statutory grounds for termination

[1] This Court denied respondent's application for leave to appeal the trial court's order. *In re Leslie,* unpublished order of the Court of Appeals, entered March 17, 2013 (Docket No. 313749).

were established under MCL 712A. 19b(3)(c)(*i*), (c)(*ii*), (g), and (j). After receiving additional evidence, the trial court also determined that termination of respondent's parental rights was in the child's best interests.

II. DUE PROCESS

On appeal, respondent raises several claims of error that she contends implicate her right to due process. Respondent does not contend, and the record does not disclose, that these due process claims were raised below and presented to the trial court. Accordingly, we review these unpreserved claims of error for plain error affecting respondent's substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

In general, procedural due process requires fundamental fairness. *In re Brock*, 442 Mich 101; 499 NW2d 752 (1993). Due process is a flexible concept, which calls for procedural protections as demanded by the particular situation. *Id.* A court should consider relevant precedent and the interests at stake in a proceeding when considering a respondent's claim that she was deprived of procedural due process. *Id.*

Respondent's first claim is based on her contention that one of her former attorneys provided constitutionally deficient legal advice. Principles governing claims of ineffective assistance of counsel in criminal proceedings apply by analogy to child protection proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001). Because respondent did not raise an ineffective assistance of counsel issue in an appropriate motion or request for an evidentiary hearing in the trial court, this Court's review of this issue is limited to errors apparent from the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). To establish ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were prejudicial, i.e., that but for counsel's errors, there exists a reasonable probability that the result of the proceeding would have been different. *In re CR*, 250 Mich App at 198.

Respondent has not established any factual support for her claim that former counsel failed to advise her of the privileged communications abrogated by the Child Protection Law, MCL 722.621 *et seq*., as discussed in *In re Brock*, 442 Mich at 115-119. The record does not disclose what advice counsel may or may not have provided with respect to this issue, or whether it was even a subject of discussion with respondent. Without an evidentiary basis for determining the scope of advice provided by respondent's former counsel, respondent cannot satisfy her burden of establishing the factual predicate for this claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Furthermore, even assuming that former counsel failed to advise respondent regarding the law on privileged communications set forth in *In re Brock*, 442 Mich 101, respondent has not demonstrated any resulting prejudice. *In re CR*, 250 Mich App at 198. Although respondent suggests that proper advice would have affected her decision not to sign releases for VA social workers, the trial court had previously ordered her to sign releases and she had an obligation to follow the court's order even if she believed that it was wrong. *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004).

In addition, the trial court heard testimony from DHS caseworkers regarding the circumstances of respondent's refusal to sign releases. We find no support in the record for respondent's contention that the case would not have proceeded to termination, or that the trial court's termination decision would have been any different, but for former counsel's alleged failure to advise respondent regarding the law governing privileges in Michigan.

Respondent's additional argument that former counsel was ineffective for not advising the trial court of Michigan law governing privileged communications and, in particular, our Supreme Court's decision in *In re Brock*, 442 Mich 101, is also unavailing. A judge is presumed to have an understanding of the law. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Absent proof to the contrary, a court is also presumed to have followed the law. *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). Nothing in the record indicates that the trial court was not aware of *In re Brock* or failed to properly follow the law, and the fact that the court ordered respondent to sign releases does not overcome this presumption. Although respondent was clearly opposed to signing releases, an essential part of complying with a treatment plan is that the parent benefit from services that are offered. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). The trial court could reasonably conclude that it was necessary for respondent to sign releases to enable the DHS to monitor and ascertain her progress.

In addition, respondent fails to address whether federal confidentiality laws would require releases before VA social workers could speak with DHS caseworkers regarding respondent's therapeutic services. Our Supreme Court's decision in *In re Brock* does not address the effect of federal confidentiality laws, or even whether communications sought by the DHS as part of its ongoing services in a child protection proceeding are subject to MCL 722.631, but only considered whether MCL 722.631 precludes a party from raising a legally recognized privileged communication to bar evidence in a child protection proceeding. Considering respondent's failure to establish any authority for permitting a trial court to order VA social workers to speak with DHS caseworkers about a client's case without a release from the client, we find no basis for respondent's claim that the trial court should have ordered the VA social workers to disclose information about respondent's treatment without respondent's consent. We also reject respondent's claim that she had a due process right to have the DHS and the minor child's lawyer-guardian ad litem seek such an order. And as indicated previously, the court had already ordered respondent to sign necessary releases, and respondent did not have the right to disregard the trial court's order because she did not agree with it. *Johnson*, 261 Mich App at 346. Because respondent had the ability to establish communications between the DHS and the VA workers by complying with the trial court's order, there exists no fundamental unfairness. *In re Brock*, 442 Mich at 111. Thus, we reject respondent's claim of a due process error.

Respondent also argues that she was deprived of due process because the trial court refused to remove the minor child's lawyer-guardian ad litem on the basis of a conflict of interest. Because the record does not indicate that respondent ever sought to remove the child's lawyer-guardian ad litem in an appropriate motion, this issue is unpreserved. "An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights." *In re Williams*, 286 Mich App at 274. To establish that an alleged conflict of interest amounts to ineffective assistance of counsel, it must be shown that there is an actual conflict of interest affecting counsel's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

Further, the statute cited by respondent, MCL 712A.17d(1), provides that "[a] lawyer-guardian ad litem's duty is to the child." Respondent does not have standing to assert the minor child's constitutional rights. *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). Accordingly, respondent has no standing to assert this alleged due process error.

Respondent also claims that the child's placement with her father in Virginia deprived her of due process because it made reunification impossible. Respondent's due process argument is devoid of any citation to relevant precedent in support of this claim. *In re Brock*, 442 Mich at 111. Moreover, respondent's argument fails to adequately consider the multiple interests at stake in a child protection proceeding. *Id.*. Both respondent and the child's father had a fundamental liberty interest in the care, custody, and management of the child, protected by the Fourteenth Amendment. See *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (opinion of CORRIGAN, J.). Further, upon removing the child from respondent's home, the trial court was required to place the child in the most family-like setting consistent with the child's needs. *Id.* at 95. And while the DHS is required to make reasonable efforts to rectify the conditions that caused a child's removal by adopting a case service plan, *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005), citing MCL 712A.18f, "[r]easonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child with the family." MCL 712A.19(12).

In this case, the trial court's placement decision was based on its evaluation of the child's needs and interests after a placement hearing. Considering that it is the child's needs that are most relevant in deciding the child's placement, and the preference for placement with family members, respondent has not established a due process violation arising from the child's placement with her father.

Although respondent asserts that the child's placement with her father in Virginia inhibited face-to-face contact with the child, parenting time is not an absolute requirement in a child protection proceeding. It may be suspended if harmful to a child, even if the parenting time would be supervised. *In re Rood*, 483 Mich at 95-96; MCL 712A.18(3)(e). Further, there are various ways of judging parental fitness apart from contact with the child, such as the parent's participation in other services, attendance at court hearings, and contact with the DHS. See *In re Sours*, 459 Mich 624, 638-639; 593 NW2d 520 (1999). The record indicates that the DHS took steps to allow respondent to continue to participate in some form of supervised contact with the minor child, either by telephone or through written communication. The record also indicates that the DHS attempted to engage respondent in other services, including parenting classes and counseling, to rectify the conditions that caused the child's removal. Respondent has not established that the DHS's efforts were unreasonable.

Respondent also argues that she was deprived of due process because she was forced to sign a parent-agency agreement that contained a requirement that she take a Child in the Middle parenting class. The record does not factually support respondent's claim that she signed the parent-agency agreement under duress. Further, regardless of whether respondent signed the parent-agency agreement, or her reason for doing so, the trial court properly could consider respondent's compliance with and benefit from offered services. See *In re Gazella*, 264 Mich App at 676-677. Thus, regardless of whether respondent signed the parent-agency agreement, her failure to take advantage of all parenting classes offered in this case was relevant to whether

she was able to provide the child with a home where the child would no longer be at risk of harm.

In light of the testimony of the parenting instructor, Marsha Bird, explaining why she recommended that respondent take the Children in the Middle parenting class, it was reasonable for DHS to offer respondent the opportunity to take the class. Respondent was permitted to offer her own explanation for not taking the class for the trial court to consider. Because DHS is required to make reasonable efforts to rectify the conditions that caused a child's removal, *In re Fried*, 266 Mich App at 542, and respondent had notice of the plan, respondent has not shown a plain due process error. *In re Williams*, 286 Mich App at 274.

Respondent also argues that her right to due process was violated when the trial court considered information not in evidence when determining whether a statutory ground for termination had been established. Respondent also asserts that only evidence introduced at the adjudicative trial and termination hearing could be considered. We disagree.

First, the trial court properly recognized at the termination hearing that a child protection proceeding is considered one continuous proceeding. *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). Thus, evidence admitted at a prior proceeding properly may be considered at subsequent hearings. Second, the record does not support respondent's claim that the trial court relied on portions of a VA file that was not admitted into evidence at the termination hearing. "[A] judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel." *Wofford*, 196 Mich App at 282. The trial court's consideration of the VA file when addressing whether two pages should be provisionally admitted during the testimony of one of respondent's VA witnesses does not overcome the presumption that the court only considered the admitted pages and witness testimony regarding the services provided to respondent at the VA when determining the statutory grounds for termination. Therefore, we reject this claim of error.

III. DECEMBER 3, 2012, ORDER

Respondent challenges the trial court's December 3, 2012, order conditioning her right to call three VA workers as witnesses on her signing releases sufficient to allow opposing counsel to review the witnesses' files for purposes of cross-examination.[2] We review a trial court's evidentiary rulings in a child protection proceeding for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). When an evidentiary question involves a question

[2] The order also provided that Taylor could not testify unless copies of his file were made available to opposing counsel. Because respondent's counsel informed the trial court that respondent did not object to providing Taylor's records, any challenge to this aspect of the order is waived. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (counsel's affirmative approval of trial court's action constitutes a waiver); *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011) ("[r]espondent may not assign as error on appeal something that she deemed proper in the lower court because allowing her to do so would permit respondent to harbor error as an appellate parachute").

of law, such as the interpretation of a statute or court rule, this Court's review is de novo. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008).

Respondent conditions her claim regarding the trial court's evidentiary ruling on this Court determining that the holding in *In re Brock*, 442 Mich 101, does not apply to the VA records. But because the trial court only required disclosure of the VA records if respondent signed a release, we fail to see the relevance of the holding in *In re Brock* regarding privileged communications. Thus, we limit our review to respondent's claim that the trial court should have followed the discovery rules in MCR 3.922(A) and MCR 2.314(B) to determine whether to require a release as a condition for respondent calling the VA witnesses to testify.

Respondent's reliance on MCR 3.922(A) is misplaced because that rule governs discovery for the "trial" in a child protection proceeding. There are two phases in a child protection proceeding, the adjudication phase where the court determines whether it has jurisdiction over a child, and the dispositional phase where the court determines what measures to take on behalf of a child found to be within the court's jurisdiction. *In re Brock*, 442 Mich at 108. The trial is conducted as part of the adjudicative phase. MCR 3.972; see also MCR 3.903(A)(27) (defining "trial" as "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court"). Under MCL 712A.19b(1), "the court shall hold a hearing to determine if the parental rights to a child should be terminated." See also MCR 3.977(C)(2). Because MCR 3.922 does not apply to the dispositional phase of a child protection proceeding and termination of parental rights is part of the dispositional phase, respondent has not established any error.

Respondent's reliance on MCR 2.314(B) is similarly misplaced because that rule is not within the scope of the Michigan Court Rules applicable to a child protection proceeding. See MCR 3.901(A). Therefore, respondent has not established any error by the trial court in failing to apply either discovery rule as part of its evidentiary decision to require the release as a condition of the VA witnesses testifying.

IV. STATUTORY GROUNDS FOR TERMINATION

Respondent also challenges the trial court's finding of "legal justification" for terminating her parental rights. The trial court was required to find at least one statutory ground for termination in MCL 712A.19b(3) by clear and convincing evidence. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). We review the trial court's findings for clear error. MCR 3.977(K); *In re JK*, 468 Mich at 209.

Respondent's arguments on appeal are not directed specifically at the elements of the statutory grounds cited by the trial court. The trial court's decision does not identify the factual basis for its determination that §19b(3)(c)(*ii*) was established. However, it is apparent that the trial court's reliance on the remaining statutory grounds was based on respondent's history of conduct that was harmful to at least the child's mental well-being. The court was permitted to appraise itself of all relevant circumstances, including respondent's mental health history, when evaluating the conditions that led to the adjudication. *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993). It was also permitted to consider both the extent of respondent's participation in services offered by the DHS and the extent to which she benefitted from services

in determining whether a statutory ground for termination was established. *In re Gazella*, 264 Mich App at 676-677.

While respondent complied with portions of her treatment plan, the evidence clearly supports the trial court's finding that respondent did not benefit from services. Considering Bird's testimony regarding respondent's continued difficulties in the areas of punishment and discipline, we find no merit to respondent's argument that the trial court should have found that she satisfactorily completed the ACT Raising Safe Kids parenting class. And considering the testimony of respondent's individual therapist from the VA regarding the focus of their therapy, the trial court did not clearly err in questioning whether respondent was receiving the type of counseling necessary to enable her to parent the minor child. Had respondent signed releases, as ordered by the trial court, DHS caseworkers would have had an opportunity to evaluate whether respondent's therapy at the VA was adequate. Considering the evidence as a whole, we find no clear error in trial court's determination that §§ 19b(3)(c)(*i*), (g), and (j), were each established by clear and convincing evidence.

V. BEST INTERESTS

Lastly, respondent challenges the trial court's finding that termination of her parental rights was in the child's best interests. MCL 712A.19b(5). We review the trial court's findings regarding the child's best interests for clear error. MCR 3.977(K); *In re JK*, 468 Mich at 209. The trial court is required to consider the child's placement with a relative in determining whether termination of parental rights is in the child's best interests. *In re Olive/Metts*, 297 Mich App 35, 44; 823 NW2d 144 (2012). In considering the child's best interests, the court may consider the child's bond with a parent, the parent's parenting abilities, and the child's need for permanency, stability, and finality. *Id.* at 42. The petitioner must prove by a preponderance of the evidence that termination is in the child's best interests. *In re Moss*, 301 Mich App 76; 836 NW2d 182 (2013).

The trial court expressly considered the child's placement with her father. The court expressed hope that some contact between respondent and the child could be maintained, but concluded that termination of respondent's parental rights was in the child's best interests to provide the child with the certainty and stability that she required, and to place control over any future contact between respondent and the child in the hands of the child's father. The trial court did not clearly err in its evaluation of the child's best interests.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher